Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

ELAINE F. GRANT, ALFRED GRANT, and JACQUELINE LEARY, *et al.*,
Petitioners,

v.

CHEVRON PHILLIPS CHEMICAL CO., L.P., as successor in interest to Chevron Chemical Company,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attorney fee that could potentially be awarded the class representatives from a common fund in a class action under Louisiana law can be used to satisfy the amount in controversy requirement for diversity jurisdiction.

PARTIES TO THE PROCEEDINGS

Petitioners

Elaine F. Grant, Alfred Grant, and Jacqueline Leary, all individuals with no corporate affiliations.

Respondents

Chevron Phillips Chemical Company, L. P., as successor in interest to Chevron Chemical Company.

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The Order and Reasons of the District Court for the Eastern District of Louisiana is reported at *Grant, et. al. v. Chevron Chemical Co.*, 2001 WL 839010 (E.D. La. 2001), and is set forth in the Appendix hereto (App. B at 30a).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Opinion on October 11, 2002. No Petition for Rehearing or Rehearing *En Banc* was filed. This Petition for Writ of Certiorari is filed within 90 days of the Opinion of the Fifth Circuit. 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1332(a)(1) which states:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and

costs, and is between-
(1) citizens of different States

This case also involves LSA-C.C.P. article 595(A), a Louisiana Code of Civil Procedure article applicable to class actions and which states:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. On February 12, 2001 there was an explosion at the Chevron Phillips Chemical Co. (hereafter "Chevron") chemical facility in St. James Parish, Louisiana. Petitioners Elaine Grant, Alfred Grant, and Jacqueline Leary filed a class action Petition for Damages in state court in Louisiana alleging that they and all others similarly situated suffered damages including fear and fright, inconvenience, personal injury and property damage as a result of the explosion at the Chevron facility.

The class action Petition for Damages was filed in the 23rd Judicial District Court, Parish of St. James, State of Louisiana alleging Chevron's fault for the explosion and the resulting damages. The claims against Chevron sounded in tort alleging negligence

pursuant to LSA-C.C. article 2315, and/or strict liability pursuant to LSA-C.C. art. 2317. It is well settled that absent some statutory or contractual language to the contrary, attorneys fees are not recoverable in Louisiana. [1]

On the face of their Petition, Petitioners alleged an amount in controversy individually of less than $74,999.00. Despite this allegation, Chevron removed the matter to the United States District Court for the Eastern District of Louisiana alleging complete diversity of citizenship and more than $75,000 in controversy. Petitioners moved to remand for lack of subject matter jurisdiction, a motion which Chevron opposed. In its opposition Chevron argued that Louisiana Code of Civil Procedure article 595(A)and the Fifth Circuit's decision in *In re Abbott Laboratories,* 51 F.3d 524 (5th Cir. 1995) supported its contention that attorney's fees are attributed to the class representatives, thus the amount in controversy would exceed the requisite jurisdictional amount of $75,000. Petitioners argued that the Fifth Circuit's decision in *Abbott* did not go so far as Chevron believed, and that in addition to article 595(A) there had to be a separate statutory basis for attorney's fees. Petitioners' position

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[1] *See, Hernandez v. Harson,* 237 La. 389, 408; 111 So.2d 320, 327 (La.1959). ("It is well recognized. . . that as a general rule attorney's fees are not allowed except where authorized by statute or contract." (Citations omitted)). *See also, In re Gas Water Heater Products Liability Litigation,*97-121 (La.App.5 Cir. 6/30/97), 697 So.2d 341, 345 ("... attorneys' fees are not recoverable as an element of damages. . . ." (Citation omitted)).

is that it is inappropriate for the district court to consider as "in controversy" attorney's fees which are merely permitted to be allocated to the class representatives pursuant to La. C.C.P. article 595(A), and which if so allocated by the court would come not from the defendant, but allocated to the class representatives from funds available for the class as a whole. The district court entered an order denying the Plaintiffs' Motion to Remand and certifying the matter for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on July 24, 2001. The district court reasoned that some courts in the Eastern District have interpreted *Abbott* to allow the aggregation of attorney's fees permissible under La. C.C.P. article 595(A) only when there is another statute applicable to the matter which mandates the award of attorney's fees, while other courts have interpreted *Abbott* to mean that attorney's fees may be considered in calculating the amount in controversy even when there is no statute authorizing attorney's fees and the sole basis for those attorney's fees is article 595(A). Recognizing the split of authority that exists within the district court, and that because of the split a decision as to whether a diversity action can be removed to federal court in a Louisiana class action would depend on the luck of the draw, the district court denied the Motion to Remand and opined that a need for uniformity on the issue exists and that the question is appropriate for interlocutory appeal under 28 U.S.C. § 1292(b). The matter was taken up to the Fifth Circuit and oral argument was presented on August 8, 2002. On October 11, 2002, the Fifth Circuit entered its opinion upholding the ruling of the district court denying the motion to remand. In so ruling, the Fifth Circuit opined that the decision in *Abbott* did not

require a separate statutory basis for attorney's fees in addition to article 595(A), and that the attorney's fees which may be allowed to class representatives pursuant to that article may be included in calculating the requisite amount in controversy. Petitioners believe that the Fifth Circuit's opinion improperly allows attorney's fees to be considered in calculating the amount in controversy even when such fees are not collectable from the defendant and thus not in "controversy." Such a fee is a common-fund attorney fee and does not represent a single title or right of class members and is not aggregable for purposes of calculating amount in controversy for diversity jurisdiction. Thus, the Petitioners file this Petition for a Writ of Certiorari to review the decision of the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT AND OF THE ELEVENTH CIRCUIT

As recognized by the Eleventh Circuit Court of Appeal in *Davis v. Carl Cannon Chevrolet-Olds, Inc.*,182 F.3d 792 (11th Cir. 1999), the "Supreme Court [has]. . . interpret[ed] "matter in controversy" to permit aggregation of multiple plaintiffs' claims only when 'plaintiffs [have] unite[d] to enforce a single title or right in which they have a common and undivided

interest.'" *Davis, id.*, 796, *citing Snyder v. Harris*, 394 U.S. 332, 335, 89 S.Ct. 1053, 1056, 22 L.Ed.2d 319 (1969); *accord, Zahn v. International Paper Co.*, 414 U.S. 291, 294; 94 S.Ct. 505, 508, 38 L.Ed.2d 511 (1973); *see, e.g., Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588, 59 S.Ct. 744, 748, 83 L.Ed. 1001 (1939); *Shields v. Thomas*, 58 U.S. (17 How.) 3, 5, 15 L.Ed. 93 (1854). Relying on the cited Supreme Court precedent, the Eleventh Circuit held that an attorney's fee to be deducted from a common fund "does not represent a 'single title or right' of the plaintiffs. . . ." *Davis, supra.*, 796. The same is true in the instant case.

Davis was a class action in Alabama seeking to represent purchasers of extended service contracts on General Motors vehicles. The case was removed to federal court with, as in this case, the sole basis for satisfying the amount in controversy being the claim for attorney's fees. It was acknowledged in *Davis*, as it is here, that the plaintiffs' attorneys would ultimately seek a fee for their work. The question in *Davis* then, was how would the law of Alabama shape that fee award. The Eleventh Circuit held that "[i]f Alabama courts respect their precedents, then any award of attorney's fees will be deducted from the plaintiffs' damages fund." *Davis, supra.*, 795. Thus, the Eleventh Circuit characterized the fee as a fee under the "'common fund' doctrine, which authorizes the trial court to deduct as an attorney's fee a reasonable percentage . . . of a common fund that class representatives have collected for distribution among the class." *Davis, id., citations omitted.* The *Davis* case is no different than the case at bar. There, reasonable attorney's fees for class counsel are allowed by doctrine and Alabama precedent. In the

end, whether under Louisiana's Code of Civil Procedure, or Alabama's legal precedent and doctrine, the result is the same; the attorney's fee will directly compensate the lawyers from the common fund and does not represent a collective interest of the plaintiff class and is not aggregable. *See; Davis, supra.*, 797,

II.

THE COURT OF APPEAL'S DECISION CONFLICTS WITH LOUISIANA'S INTERPRETATION OF ITS CODE OF CIVIL PROCEDURE

In *In re Gas Water Heater Products Liability Litigation*, 97-121 (La. App. 5 Cir 6/30/97), 697 So.2d 341, Judge Thomas Daley writing for Louisiana Fifth Circuit Court of Appeal stated:

> LSA-C.C.P. art. 595 is *discretionary*; it does not require the court to award attorneys' fees, nor does it make attorneys' fees a statutory or legal element of damages in a class action when the underlying cause of action does not otherwise provide for attorneys' fees as a statutory element of damages. *Id.*, 346 (*emphasis in original*).

While *In re Gas Water Heater Products Liability Litigation* does not interpret LSA-C.C.P. art. 595(A) for the purposes of determining amount in controversy for federal court jurisdiction, it does interpret the article as one that *does not* make attorney's fees a statutory or legal element of damages in a class action when the

underlying cause of action does not otherwise provide for attorneys' fees as a statutory element of damages. This is important because Louisiana law specifically disallows an award of attorney's fees in the absence of statutory or contractual language to the contrary.[2] Since Louisiana does not consider article 595 to be a statutory basis for an award of an attorney's fee; logically then, absent a separate "triggering statute" (as was the case in *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995)), there is no attorney's fee to consider in calculating amount in controversy. The conclusion then is in a Louisiana class action, according to a Louisiana appellate court, if any fee is to be awarded, it will be deducted from the common fund and awarded directly to the class representatives' attorney (class counsel). Thus, the fee in Louisiana, like the fee in Alabama "does not represent a collective interest of the plaintiff class and is not aggregable." *See; Davis, supra.*

III.

THE QUESTION IS IMPORTANT BECAUSE THE DECISION OF THE COURT OF APPEALS MAKES THE

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2 *See, Hernandez v. Harson*, 237 La. 389, 408; 111 So.2d 320, 327 (La.1959). ("It is well recognized. . . that as a general rule attorney's fees are not allowed except where authorized by statute or contract." (Citations omitted)). *See also, In re Gas Water Heater Products Liability Litigation*,97-121 (La.App.5 Cir. 6/30/97), 697 So.2d 341, 345 ("... attorneys' fees are not recoverable as an element of damages. . . ." (Citation omitted)).

"AMOUNT IN CONTROVERSY" PORTION OF THE REMOVAL EQUATION AUTOMATICALLY FULFILLED IN VIRTUALLY EVERY CLASS ACTION FILED IN THE STATE OF LOUISIANA WHERE DIVERSITY IS PRESENT

If the Court of Appeal is correct and LSA-C.C.P. art. 595 standing alone, without some other "triggering statute" allowing for the recovery of attorney's fees as an element of damages, then all class actions against diverse defendants will cease to exist in Louisiana state courts. In this day and age there can be little doubt that attorney's fees in practically all class actions would be sufficient to reach the jurisdictional mount of $75,000. Diversity jurisdiction requires complete diversity of citizenship *and* the requisite amount in controversy. 28 U.S.C. § 1332(a)(1). However, if the decision of the Court of Appeal stands, in Louisiana amount in controversy would be a given in every case. The federal courts will be awash in class action litigation for every chemical release, fire, and explosion – many if not most of which involve *de minimus* claims for fear, fright, and inconvenience – much like the case at bar.

IV.

CONCLUSION

For the reasons as set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Decided October 11, 2002]

No. 01-31350

Elaine F. GRANT; Alfred Grant; Jacqueline Leary,
Plaintiffs-Appellants,

v.

CHEVRON PHILLIPS CHEMICAL CO. L.P., as Successor in Interest to Chevron Chemical Company,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana No. 01-0750—
Eldon E. Fallon, *Judge*

Before WIENER, EMILIO M. GARZA, and PARKER, Circuit Judges.

Court of Appeals Opinion – 10/11/02

OPINION

WIENER, Circuit Judge:

The captioned case is before us by virtue of the district court's highly principled certification for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We are called on to answer an important removal and remand question which (1) arises in the context of diversity jurisdiction under 28 U.S.C. § 1332, (2) is unique to Louisiana class actions because of the state's statutory scheme, and (3) has polarized the judges of the Eastern District of Louisiana. This question implicates the jurisdictional-amount prong of the test for diversity jurisdiction, and asks:

> When considering the class plaintiffs' motion to remand, can attorney's fees that the court may allow to class representatives pursuant to Paragraph A. of art. 595 ["art. 595(A)"] of the Louisiana Code of Civil Procedure ["LCCP"] be included in calculating the requisite amount in controversy, absent some other provision of Louisiana law that specifically authorizes the award of attorney's fees?

To get this divisive question before us under § 1292(b), the district judge denied the motion of the Plaintiffs-Appellants ("class representatives") to remand the case to the state court in which they filed it as a putative class action against the Defendant-Appellee ("Chevron"), and from which Chevron removed it to the district court. The parties agree, and the facts confirm, that complete diversity exists between the class representatives and Chevron, [FN1] leaving the amount in controversy as the sole contested issue on appeal.

For the reasons explained below, we answer "yes" to today's question. And, as none contest that the amount here in controversy crosses § 1332's threshold of $75,000 when all allowable attorney's fees are attributed exclusively to the class representatives, we affirm the refusal to remand this case to the state court of origin, and return it to the district court for further proceedings.

I. Facts and Proceedings

Just after noon on the day following an industrial accident at Chevron's chemical plant in St. James Parish, Louisiana, counsel for the class representatives filed the instant tort action in the state district court for that parish. The petition identifies Chevron as the defendant, the suit as a class action, and the members of the putative class as all persons or entities located within five miles of the plant who may have suffered damages as a result of the incident. The class representatives' petition asserts Louisiana causes of action in negligence and strict liability, and alleges that "[t]he claims of the plaintiffs herein for compensatory damages are all each [sic] individually less than $74,999.00." In addition to seeking certification of the class, determination of Chevron's liability to the class for compensatory damages, and recognition of the right of each individual class member to bring a separate action to establish the quantum of his damages, the petition asks the state court to allow the class representatives to "recover their costs for the prosecution of this class action."

Chevron removed the case to the Eastern District of

Louisiana, asserting that (1) diversity is complete and (2) the amount in controversy is sufficient to support diversity jurisdiction when attorney's fees allowable under art. 595(A) are attributed to the class representatives pursuant to *In re: Abbott Laboratories* ("*Abbott*"). [FN2] Art. 595(A) defines the representative parties' "reasonable expenses of litigation" as "including attorney's fees." [FN3]

The class representatives timely filed a motion to remand, insisting that *Abbott* interpreted art. 595(A) as attributing attorney's fees to the class representatives only when a separate Louisiana statute (Louisiana Revised Statute § 51:137 in *Abbott*) authorizes assessing "a reasonable attorney's fee" to the defendant, over and above compensatory and any other damages. They rely on the facts that (1) no one of them (or any other class member, for that matter) is claiming a quantum of damages in this tort suit that could exceed § 1332's $75,000 jurisdictional amount threshold for diversity jurisdiction, without including interest and costs such as attorney's fees, and (2) not only are they not seeking attorney's fees under any specific Louisiana statute that expressly provides for such recovery, [FN4] they are not entitled to recover attorney's fees from the defendant, Chevron, in this ordinary Louisiana tort suit, grounded as it is in negligence and strict liability. [FN5]

The district judge noted and described in detail the division among those judges of his court (including himself) who had considered whether alone, i.e., in the absence of a separate attorney's fees statute, the attorney's fees allowable to class representatives under

art. 595(A) are includable in calculating the amount in controversy for purposes of diversity jurisdiction, [FN6] noting which judges had answered "yea" and which "nay." Rather than perpetuate this intra-district split of authority by ruling one way or the other on the issue, the court denied the class representatives' motion to remand and granted Chevron's motion to certify the question for interlocutory appeal pursuant to § 1292(b).

II. Analysis

A. *Standard of Review*

[1] When there is complete diversity between all plaintiffs and all defendants, we review *de novo* an order denying remand to state court on the ground that the amount in controversy exceeds the minimum jurisdictional requirement. [FN7]

B. *Background: Removal from State Courts of Louisiana*

Subject to specific exceptions not here relevant, Louisiana prohibits a plaintiff from alleging or demanding a specific dollar amount of damages, limiting the prayer for relief to "such damages as are reasonable in the premises." [FN8] To accommodate the situation when the removal sought is from a Louisiana court and subject matter jurisdiction is grounded in diversity of citizenship, we have modified the usual rule for determining whether the amount in controversy is present. In such Louisiana situations, we permit the party seeking to maintain federal jurisdiction to establish by a preponderance of the evidence that the amount in controversy exceeds $75,000. [FN9] When the case is one that has been

removed from state court, such party may satisfy this burden in either of two ways: (1) by demonstrating that it is "facially apparent" from the petition that the claim likely exceeds $75,000 or (2) "by setting forth *the facts* in controversy--preferably in the removal petition, but sometimes by affidavit--that support a finding of the requisite amount." [FN10]

We have not yet clearly established--and, indeed, might not be able to establish--the precise quantum of evidence required to preponderate and thereby show an amount in controversy sufficient to establish diversity jurisdiction. In *De Aguilar* [FN11]--a case situated identically to this one--we stated that, because "the plaintiffs, in a bold effort to avoid federal court, [ ] specifically allege[d] that their respective damages will not exceed the jurisdictionalamount," [FN12]

> [t]he preponderance burden forces the defendant to do more than point to a state law that *might* allow the plaintiff to recover more than what is pled. The defendant must produce evidence that establishes that the actual amount in controversy exceeds [the jurisdictional threshold]. [FN13]

The category of state laws that the *De Aguilar* panel appears to have had in mind are those embodying the familiar maxim that a court may award more in damages than the plaintiff demands. [FN14] This maxim contemplates the existence of a state statute or doctrine that entitles a plaintiff to recover more than he has demanded. Louisiana is such a state, and has been at least since 1960 when its Code of Civil Procedure was enacted. Before that, essentially every state court petition concluded with an express prayer for general and equitable relief, which was considered to be a

prerequisite for obtaining a judgment in excess of or different from the plaintiff's express prayer or demand. Enactment of the Louisiana Code of Civil Procedure eliminated the need for such a talismanic incantation, thenceforth treating every petition as though it contains such a prayer and expressly permitting a judgment to exceed the prayer or demand:

> Except [for a judgment by default], a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief.* [FN15]

[4] Thus, if a defendant in a Louisiana suit can produce evidence sufficient to constitute a preponderance showing that, regardless of the style or wording of the demand, the amount in controversy actually exceeds § 1332' s jurisdictional threshold, that Louisiana case will then resemble any other amount-in-controversy-case, bringing into play the foundational rule of removal jurisdiction: The plaintiff can defeat diversity jurisdiction only by showing to a "legal certainty" that the amount in controversy does not exceed $75,000. [FN16] And we have emphasized that "this is not a burden-shifting exercise"; rather, the "plaintiff must make all information known at the time he files the complaint." [FN17]

Finally, our special accommodation for testing the amount in controversy in Louisiana cases in which the quantum of the plaintiffs' demand could not have been alleged in dollars because of LCCP art. 893's proscription, has engendered the recognition that the federal district court's jurisdictional- amount calculus

must include attorney's fees when an applicable Louisiana statute allows the award of such fees. [FN18] Until 1995, however, those cases involved individual actions, not class actions.

C. Abbott

Then along came *Abbott*. It required us to decide, in the context of Louisiana class actions, whether the potential for an award of attorney's fees under a Louisiana statute specific to the cause of action at issue (price fixing in *Abbott*) must be included by the district court in determining the amount in controversy; and, if so, how such fees are to be attributed. [FN19] Being a price-fixing case rather than an ordinary tort case, *Abbott* implicated § 51:137, which provides:

> Any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover threefold the damages sustained by him, the cost of suit, *and a reasonable attorney's fee.* [FN20]

This provision obviously requires the court to tax attorney's fees (1) *to the losing defendant,* (2) *over and above damages,* and (3) *in addition to other costs.* Generally, in the context of a Louisiana class action, attorney's fees under § 51:137 would be attributable pro rata to each prevailing class member as a "person who is injured." [FN21] Thus, the sole relevant issue in *Abbott* was whether art. 595(A) changes the attribution to require that the total amount of attorney's fees assessable against the defendant under § 51:137 be attributed exclusively and entirely to the class representatives.

None dispute that in *Abbott* we answered this question in the affirmative, holding that, in calculating the amount in controversy, all awardable attorney's fees must be attributed to the class representatives to the exclusion of the other members of the class. [FN22] Neither is it disputed that we based that holding on art. 595(A)'s requirement that attorney's fees allowed as an element of litigation expenses are to be allowed exclusively to the class representatives.

Although today's inquiry begins with *Abbott*'s rule attributing all class action attorney's fees to the class representatives, it is important to recognize at this juncture that in *Abbott* we were not required to decide, and in fact could not and thus did not decide, whether, in the absence of a separate statute imposing attorney's fees on the losing defendant (such as § 51:137 in *Abbott*), art. 595(A) either requires or permits the attorney's fees that the court may "allow" to the class representatives to be included in the jurisdictional-amount calculation. The obvious reason why this issue (which is the one squarely presented to us today) was *not* before us in *Abbott* is that there was present in *Abbott* a state statute (§ 51:137), that (1) was specific to the price-fixing cause of action, (2) was separate from and in addition to art. 595(A), and (3) mandated the payment of attorney's fees to prevailing class members. Therefore, the only question presented in *Abbott* was whether, for purposes of calculating the amount in controversy, attorney's fees recoverable under § 51:137 were attributable (1) ratably to all class members, or (2) exclusively (and entirely) to the class representatives. Thus, art. 595(A)'s sole function in *Abbott* was to supply the *ratio decidendi* for holding that attorney's fees allowable in a Louisiana

class action must be attributed to the class representatives. It follows, then, that because a separate attorney's-fees statute was present in *Abbott*, anything we might have said about attorney's fees allowable under art. 595(A), when standing alone, would have been *dicta*.

Nevertheless, some judges of the Eastern District of Louisiana have read *Abbott* expansively, apparently conflating its *attribution* holding with the unaddressed question of art. 595(A)'s *authorizing* the allowance of attorney's fees *vel non*. These jurists have read *Abbott* to stand for the proposition that, absent some other attorney's fees statute, the attorney's fees *allowable* (as distinct from *attributable*) under art. 595(A) cannot be counted toward the class representatives' amount in controversy. More than one of these judges seized on *Abbott* 's use of the word "key" [FN23] in referencing to § 51:137, to read our holding as requiring the presence of a separate attorney's fees statute every time. But such a reading would make the word "key" carry much more water than intended.

"Key" in *Abbott* is not synonymous with "indispensable" or "prerequisite" or "*sine qua non* ", or "necessary." It is merely a rhetorical segue to the factual observation that, *in that particular case*, the attorney's fees, which happened to be *authorized* by a separate statute, were *attributable* to the class representatives and thus includable in calculating the amount in controversy. This in turn obviated any need to look to art. 595(A) as a possible source of authority to allow attorney's fees. Simply put, our reference in *Abbott* to the "other" statute as "key" [FN24] cannot be read to

mean that attorney's fees must be supplied by a separate statute in every case. In fact, after that segue, § 51:137 is never again mentioned in the *Abbott* opinion: The entire substantive analysis focuses on the *attribution* function of art. 595(A), never mentioning its authorization function.

As settled law, *Abbott* 's rule of *attribution* of attorney's fees to the class representatives is not questioned by the parties. *Abbott* did not, however--and,given the presence of § 51:137, could not--address whether, standing alone, art. 595(A) can also serve as an independent source of attorney's fees in the absence of a separate statutory source. This is the question that has divided the judges of the Eastern District of Louisiana since *Abbott*, and this is the *res nova* question squarely presented today.

As noted, there is no provision of Louisiana law that allows, much less commands, the court to impose an award of attorney's fees on the defendant who is cast in judgment in an individual (*non*-class action) tort case. So, if this were an individual tort action rather than a class action, the determination of the amount in controversy for purposes of removal and remand could not include attorney's fees. But alas, this is a Louisiana class action, so we are bound, in the wake of *Abbott*, to analyze art. 595(A) further and determine whether, in addition to being the source of *Abbott* 's holding that attorney's fees are *attributable* to class representatives, this code article, standing alone, is also the source of a class-action exception to Louisiana's no-attorney's-fees-in-tort-suits rule. For the reasons hereafter explained, we hold that it is.

D. *Art. 595(A), Louisiana Code of Civil Procedure*

1. *Plain Wording*

In its entirety, art. 595(A) reads:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class. [FN25]

Literally, this article is expressed (1) *permissively,* using "may" rather than "shall"; and (2) *conditionally,* authorizing the court to allow the representative parties to recover litigation expenses (which expressly include attorney's fees) *only if* the class litigation is the producing cause of either (a) a common "fund" that is *available* to the class *or* (b) some other type of "recovery or compromise" that is *beneficial* to the class. We first note that, on its face, this code article does not condition the court's authority to grant fees on the class's being successful to the point of judgment; rather, art. 595(A) requires only the availability of either a common fund or some other result that is beneficial to the class: The fund or the other recovery can eventuate either from a judgment or from some non-judicial disposition, such as settlement, compromise, alternative dispute resolution, or the like.

We next note that the plain wording of art. 595(A) does not literally limit the permissible sources available for attorney's fees. Facially, the code article does not restrict the source of such court-allowed fees to the fund or other recovery for the benefit of the class; the article requires only that such benefit result from the class

litigation. Neither does the article either expressly authorize or expressly prohibit the court's tagging the defendant with such fees. The Official Revision Comments to art. 595(A) [FN26] can be read as the Legislature's elimination of any question of source by stating its intention that attorney's fees allowed to the class representatives under authority of art. 595(A) are "to be paid out of the fund or benefits made available" by the class representatives' litigation efforts. In Louisiana's code-drafting scheme, however, such comments are not "the law," but rather are instructive or clarifying. Like legislative history, they are most compelling when the code article itself is ambiguous--and we are not prepared to say that art. 595(A) is ambiguous. [FN27] Instead, we assume *arguendo* that art. 595(A) does not authorize the court to assess attorney's fees to the class action defendant; rather, that only the common "fund" or the other "benefits" made available to the class by the class representatives' litigation are eligible sources of such fees.

Under that assumption, art. 595(A) remains a fee-shifting statute, but the shifting is not between the class and the defendant. Instead, the shifting is between the class representatives and the rank and file members of the class. Furthermore, such shifting is *not* restricted to common fund cases (which this case is not): The court can allow fees to the class representatives either from "a fund made available" or from "a recovery or compromise ... which is beneficial" to the class. Thus, in a non-fund case like this one, each class member's damage recovery could be reduced by the court and shifted to the class representatives, even if art. 595(A)

were construed narrowly to prohibit the court from assessing attorney's fees to the losing tortfeasor.

In every Louisiana class action, then, the class representatives could receive attorney's fees from either (1) the defendant directly, pursuant to a separate attorney's fee statute, or (2) the non- representative members of the class indirectly, as a result of art. 595(A)'s fee shifting and attribution. In either case, calculation of the anticipated recovery of the class representatives--the only one that matters for purposes of § 1332--must include those potential attorney's fees in addition to damages, just as *Abbott* commands. We know from *Zahn v. International Paper Co.*, [FN28] that in class actions, we separately test the amount in controversy of each class member, whether class representative or rank and file. We also know from *Zahn* that we are *not* to aggregate the potential recovery of class members. [FN29] In addition, § 1367 instructs that the jurisdictional amount is satisfied when the potential recovery (including attorney's fees when appropriate) of only one plaintiff exceeds § 1332's threshold. And *Abbott* confirms that when the federal court has jurisdiction over at least one member of the class by virtue of (1) diversity of citizenship and (2) a sufficient jurisdictional amount, that court has supplemental jurisdiction over all diverse class members, including those whose claims fall short of § 1332's amount-in-controversy threshold. [FN30]

2. *Mandatory or Permissive?*

The class representatives would make much of the fact that art. 595(A)'s authorization for the court to allow

them attorney's fees is couched in permissive terms, employing "may" rather than "shall." Such reliance is misplaced. The only other federal court of appeals to have addressed this issue directly is the Ninth Circuit which, in *Galt G/S v. JSS Scandinavia, [FN31]* squarely held that "where an underlying statute authorizes an award of attorney's fees, *either with mandatory or discretionary language,* such fees may be included in the amount in controversy." [FN32] Notably, the state statute at issue in *Galt* did in fact provide for the discretionary award of attorney's fees, so the quoted language clearly is not *dictum.* As one leading treatise notes:

> There is authority for the proposition that when the applicable substantive law makes the award of an attorney's fee discretionary, a claim that this discretion should be exercised in favor of the plaintiff makes the requested fee part of the statutorily required amount in controversy. [FN33]

[10] Here, the class representatives' petition includes the prayer for "their costs for the prosecution of this class action," and art. 595(A) defines "expenses of litigation" to include attorney's fees. Therefore, even though the general rule is that interest and court costs are not includable in calculating the amount in controversy, [FN34] attorney's fees are includable when the state statute allowing cost shifting expressly defines the allowable expenses of litigation to include attorney's fees, [FN35] especially when the plaintiffs expressly pray for recovery of costs. In the instant case, art. 595(A) expressly authorizes the court to allow attorney's fees to the class representatives as a defined element of the expenses of litigation; and although that

alone is sufficient in light of LCCP art. 862's authorization of judgments that exceed prayers or demands, it is further confirmed by the class representatives' prayer for recovery of costs. Furthermore, on this point we are bound by *Abbott*, which relied on art. 595(A) to include § 52:137's attorney's fees in the calculation of the class representative's amount in controversy. Declining to create a circuit split with the Ninth Circuit, we hold that when there is state statutory authority for the court to award attorney's fees to class representatives, "either with mandatory or discretionary language, such fees may be included in the amount in controversy." [FN36]

3. *Symmetry: Art. 595(A) as a Default Provision*

The propriety of this holding is underscored by a functional analysis of art. 595(A) in the context of Louisiana's statutory class action scheme. Such a contextual reading of art. 595(A) reveals that it is Louisiana's *default* provision for attorney's fees in class actions. Remembering that (1) as a general rule, Louisiana does not authorize the court to award attorney's fees in tort suits, and (2) art. 595(A) stands as a statutory exception to that general rule for purposes of class actions, the function and necessity of using "may" rather than "shall" becomes self-evident. Art. 595(A) completes the attorney's fees picture for Louisiana class actions by covering the otherwise-unaddressed situation in which (1) there is no separate statutory provision for attorney's fees, and (2) such fees could not be assessed against a defendant cast in judgment were the action based on an individual delictual claim rather than a class claim. The way that

art. 595(A) harmonizes Louisiana's attorney's fees rules in the context of class actions is by empowering, without mandating, the court to "allow" attorney's fees to class representatives from funds or other sources of recovery made available to the class--whether by judgment, settlement, or otherwise--so long as such favorable result is the product of the class litigation.

Quite simply, when there is a separate statute (such as § 51:137 in *Abbott*) that mandates assessment of attorney's fees in favor of the class and against the defendant, there is no need for the court to invoke art. 595(A)'s default authorization to shift a portion of the class members' recovery for the benefit of those class representatives who have contracted with the attorneys and could be out of pocket for various costs and expenses. But when, as here (and in myriad other Louisiana tort class actions) attorney's fees are *not* recoverable under some separate statute, art. 595(A) clutches in to supply the default rule, authorizing the court to "allow" attorney's fees and other costs to the class representatives out of the sums recoverable by the entire class in recompense for damages--specifically, the funds made available by judgment, compromise, or any other source, as long as it results from the class litigation and is for the benefit of all class members--whether in a common fund or in separate, individual recoveries. Of course, this is only meet and right when the recovery from which attorney's fees are allowed flows from the class action litigation.

[11] It is this default function of art. 595(A)--complementing as it does, those situations, such as in *Abbott,* in which separate statutes mandate

attorney's fees--that explains why the redactors of Louisiana's Civil Procedure code consciously employed the permissive "may" rather than the mandatory "shall." Were it otherwise, the class representatives would be, or at least could be, the unintended beneficiaries of double dipping: In an *Abbott*-like situation, receiving fees first from the defendant and then from their fellow class members as a result of a mandatory ("shall") taxing of their respective shares of either a common fund or separate awards of damages, would constitute a windfall to the class representatives rather than a making them whole, as clearly intended. The use of "may" avoids the potential of such a windfall to the class representatives, imparting discretion to the court either to (1) refrain from shifting a portion of the class members' recoveries from the rank and file to the class representatives when a separate statute imposes attorney's fees on the defendant, over and above damages; or (2) shift a portion from the shares of the non-representative class members by awarding therefrom attorney's fees and other costs to the class representatives when no other source is available. [FN37]

III. Recap

In certifying the instant issue for interlocutory appeal under 28 U.S.C. § 1292(b), the district court stated: "There needs to be uniformity on this issue." Regarding the intra-district division of authority, the court credited Chevron with the observation that "the decision as to whether a diversity action can be successfully filed in or removed to the Eastern District of Louisiana depends on the luck of the draw." And, at

oral argument, counsel for the class representatives confirmed the frustration of Louisiana class litigants (and, presumably, the various divisions of the Eastern District as well) when he stated: "However it falls, it's of no matter to me. What we need is a federal court required to apply this statute ....and [ ] a clarification of the law." [FN38] Agreeing wholeheartedly with the court and with counsel, we now resolve this divisive issue--once and for all, we hope.

When a Louisiana class action is removed from state to federal court on the basis of diversity of citizenship, and the putative class seeks remand to state court, contending, *inter alia,* that no class member's claim can exceed § 1332's minimum amount in controversy, the party seeking to maintain federal jurisdiction--here, the nonresident defendant, Chevron--must show by a preponderance of the evidence that the claim of at least one resident class plaintiff is greater than the minimum jurisdictional amount, currently $75,000. If the cause or causes of action asserted by the class are the kind for which Louisiana prohibits a plaintiff from alleging a specific quantum of damages, then, irrespective of the plaintiffs' conclusional allegation that no class member's individual claim can exceed the jurisdictional amount, another Louisiana law, LCCP art. 862, which allows the court to render judgment greater than the relief requested, provides sufficient authority for the court to include the potential attorney's fees award in calculating the amount in controversy.

When a separate, specific Louisiana law provides for the award of attorney's fees (as was the situation in *Abbott*), art. 595(A) requires all such fees to be (1)

aggregated and attributed to the class representatives, and (2) included in determining the value of the class representatives' claims when calculating the amount in controversy. As there was such a separate state law provision for attorney's fees in *Abbott*, that panel had no choice but to leave to a subsequent panel the question whether, absent such a separate state law, art. 595(A)'s provision for allowing attorney's fees to class representatives, standing alone, suffices to require inclusion of such fees, along with the class representatives' potential substantive recovery, when testing for jurisdictional amount. We are that subsequent panel, and we have done our best to address the question head on.

As a result of this endeavor, we conclude that art. 595(A) is a default provision in the law of Louisiana which functions to ensure that, in the absence of a separate attorney's-fees provision, class representatives will nevertheless enjoy the possibility of recovering attorney's fees and other expenses of litigation, even if such recovery should come not from the defendant but from the individual recoveries of the other class members; provided such recoveries are the result of the class litigation. For purposes of § 1332, the source of such attorney's fees is immaterial, so long as they are (1) *allowable* by the court and (2) *attributable* to the class representatives.

Art. 595(A) supplies authority for both of those facets of the attorney's fees issue in the class-action context--attribution and authorization. In *Abbott*, we looked to art. 595(A) solely as the source of the rule of *attribution* of all attorney's fees exclusively to the class

representatives. Today, we look additionally to that same code article's express *authorization* for the court to allow attorney's fees to the class representatives. In conclusion, we hold, on the authority of art. 595(A), that when, in connection with a Louisiana class action suit that asserts a cause or causes of action for which there is no separate attorney's fees provision under Louisiana law, attorney's fees are nevertheless (1) allowable to the class representatives, and (2) attributable to the class representatives for purposes of the court's calculation of the amount in controversy. Here, art. 595(A) serves dual purposes in the context of determining jurisdictional amount in connection with removal and remand of Louisiana class actions: (1) Art. 595(A) authorizes the allowance of attorney's fees to class representatives in default of fees being provided by some other separate statute; and (2) as construed in *Abbott*, art. 595(A) requires that allowable attorney's fees be attributed to the class representative(s) (to the exclusion of non- representative members of the class) in calculating the amount in controversy under § 1332. Stated differently, when a putative Louisiana plaintiffs' class advances a cause of action, such as tort or strict liability, for which Louisiana makes no separate provision for attorney's fees, the aggregate fee allowable under art. 595(A) shall be attributed entirely to the class representatives and included in calculating the amount in controversy.

The judgment of the district court denying remand to state court is affirmed, and this case is returned to the district court for further proceedings in that forum.

AFFIRMED AND REMANDED.

FN1. Chevron is a Delaware partnership with its principal place of business in Texas, and the class representatives are residents and citizens of Louisiana. As only the named class representatives in a class action are required to be diverse from the defendants, *see Snyder v. Harris*, 394 U.S. 332, 340, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969);*Aetna Cas. & Surety Co. v. Iso-Tex, Inc.*, 75 F.3d 216, 218 (5th Cir.1996), diversity is indeed complete in this case.

FN2. 51 F.3d 524 (5th Cir.1995).

FN3. La.Code Civ. Proc. Ann. art. 595(A) (West 1999).

FN4. Although various Louisiana statutes provide for the award of attorney's fees under specific causes of action (in *Abbott* the cause of action was price fixing for which attorney's fees are recoverable under La.Rev.Stat. Ann. § 51:137 (West 1987) ("§ 51:137")), none authorizes the courts to award attorney's fees in garden-variety, individual tort suits of this nature.

FN5. See Nassif v. Sunrise Homes, Inc., 98-3193, 2 (La.6/29/99), 739 So.2d 183, 185; *General Motors Acceptance Corp. v. Meyers*, 385 So.2d 245, 247 (La.1980).

FN6. Cases from the Eastern District of Louisiana that have answered this question in the negative include *Braxton v. IMC Phosphates MP, Inc.*, 2000 WL 1576827, at *1-2 (E.D.La.2000); *Vaughn v. Mitsubishi Acceptance Corp.*, 1999 WL 1277541, at *1-2 (E.D.La.1999); *Johnson v. Cytec Industries, Inc.*, 1999 WL 212753, at *1-2 (E.D.La.1999); *Dixon v. Ford Motor Credit Co.*, 1998 WL 914260, *3-4 (E.D.La.1998); *Ace Pest Control Co. v. KMart Corp.*, 979 F.Supp. 443, 446 (E.D.La.1997); *Greer v. Mobil Oil Corp.*, 1997 WL 180477, at *1-2 (E.D.La.1997); and *Cooper v. Koch Pipeline, Inc.*, 1995 WL 931091, at *1-2 (E.D.La.1995). Those that have answered in the affirmative include *McKnight v. Illinois Central R.R.*, 967 F.Supp. 182, 184-85 (E.D.La.1997), *In re Gas Water Heater Products Liability Litigation*, 1996 WL 732525, at *5-6 (E.D.La.1996); *Duncan v. Equitable Life Assurance Society*, 1996 WL 736988, at *6-8 (E.D.La.1996), *Millet v. Marathon Oil Co.* ("*Millet II*"), 1995 WL 495901, at *1 (E.D.La.1995), *Francis v. Lomas Mortgage USA, Inc.*, 1995 WL 468172, at * 2-3 (E.D.La.1995); and *Millet v. Marathon Oil Co.* ("*Millet I*"), 1995 WL 396313, at *1-2 (E.D.La.1995). Cases from the Middle District of Louisiana that have also answered the question in the affirmative include *Hornsby v. AlliedSignal, Inc.*, 961 F.Supp. 923, 931 (M.D.La.1997); *Kimball v. Modern Woodmen of America*, 939 F.Supp. 479, 483 (M.D.La.1996); and *Brooks v. Georgia Gulf Corp.*, 924 F.Supp. 739, 740-42 (M.D.La.1996).

FN7. *Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 722-23 (5th Cir.2002); *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 882 (5th Cir.2000).

FN8. La.Code Civ. Proc. Ann. art. 893(A)(1) (West 1984 & Supp.2001).

FN9. *Manguno*, 276 F.3d at 723; *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1409, 1412 (5th Cir.1995).

FN10. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir.1995) (emphasis in original); *accord*, *Manguno*, 276 F.3d at 723; *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir.1999); *Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir.1999).

FN11. *De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir.1995).

FN12. *Id.* at 1409-10.

FN13. *Id.* at 1412 (emphasis in original; footnote omitted).

FN14. *Id.* at n. 9 ("Such a holding would render the jurisdictional amount all but meaningless in states with rules analogous to Fed.R.Civ.P. 54(c).").

FN15. La.Code Civ. Proc. Ann. art. 862 (West 1984) (emphasis added).

FN16. *De Aguilar,* 47 F.3d at 1412 (quoting *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845 (1938)).

FN17. *De Aguilar,* 47 F.3d at 1412.

FN18. *Manguno,* 276 F.3d at 723-24 & n. 3 (construing La.Rev.Stat. § 22:658, which provides that an insurer "shall" pay attorney's fees as a penalty for not paying the insured within thirty days following submission of a claim); *Foret v. Southern Farm Bureau Life Ins. Co.,* 918 F.2d 534, 537-38 (5th Cir.1990) (determining that La.Rev.Stat. § 23:632, which uses the mandatory "shall," supported an award of attorney's fees).

FN19. *Abbott,* 51 F.3d at 526.

FN20. La.Rev.Stat. Ann. § 51:137 (emphasis added).

FN21. *Id.*

FN22. *Abbott*, 51 F.3d at 526-27.

FN23. *Abbott*, 51 F.3d at 526.

FN24. *Id.*

FN25. La.Code Civ. Proc. Ann. art. 595(A).

FN26. La.Code Civ. Proc. Ann. art. 595, official rev. cmt. (bold in original, emphasis added, and citation omitted):
Official Revision Comments--1960
(a) It is intended, in the first paragraph [art. 595(A)], that the reasonable expenses of litigation allowed the successful representative parties *is [sic] to be paid out of the fund or benefits made available by their efforts....*
(b) The consistent *policy of Louisiana heretofore has been* to allow a successful litigant only his taxable costs, and *not to award attorney's fees, unless provided by statute or convention.* Under the general equity jurisprudence, *reasonable expenses of litigation in a class action, including attorney's*

fees, may be allowed the successful litigant. The above article retains the consistent Louisiana policy with respect to the class action.

FN27. The question whether the court can assess attorney's fees to the class action defendant on the strength of art. 595(A) alone need not be answered for our purposes today, so we leave it to another day, preferably to a Louisiana court.

FN28. 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973).

FN29.*Id.* at 296-302.

FN30. *Abbott*, 51 F.3d at 527-30.

FN31. 142 F.3d 1150 (9th Cir.1998).

FN32. *Id.* at 1156 (emphasis added).

FN33. 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3712, at 277-78 & nn. 10-12 (West 3d ed. 1998 & Supp.2002) (citing *Galt* and other cases).

FN34. 28 U.S.C. § 1332(a) (requiring that the amount in controversy exceed $75,000 "exclusive of interest and costs").

FN35. "Generally, 'costs' do not include attorney fees unless such fees are by a statute denominated costs or are by statute allowed to be recovered as costs in the case." BLACK'S LAW DICTIONARY 312 (5th ed.1979).

FN36. *Galt,* 142 F.3d at 1156.

FN37. At oral argument, class counsel also advanced that this court must decide whether art. 595(A) is substantive or procedural. Counsel was mistaken for at least three reasons: (1) the *Abbott* panel clearly treated the article as substantive to reach its holding and, as the subsequent panel, we are bound by *Abbott;* (2) despite its location in the LCCP, art. 595(A) is obviously substantive on its face, specifying entitlement to costs and fees, not when or how to plead them, whether a motion is required, or the like; and (3) the law is settled that when a federal court sits in diversity, *entitlement* to attorney's fees is governed by state law. *See e.g., Shelak v. White Motor Co.,* 636 F.2d 1069, 1072 (5th Cir.1981) (characterizing the issue of awarding attorney's fees as substantive, and collecting cases); *United States v. Midwest Construction Co.,* 619 F.2d 349, 352-53 (5th Cir.1980).

FN38. Class counsel also advanced a policy argument. As we find the law clear on the issue presented by the instant case, we do not address matters of policy, which are best left to the state when, as here, state law is at the heart of the issue.

APPENDIX B

United States District Court,
E.D. Louisiana.

No. Civ.A. 01-0750.

Elaine F. GRANT, et al.)
)
v.)
)
CHEVRON CHEMICAL CO.)
)

July 24, 2001.

ORDER AND REASONS

FALLON, J.

*1 Before the Court is Plaintiffs' motion to remand the above captioned case to the 23 rd Judicial District Court, Parish of St. James, State of Louisiana. For the following reasons, Plaintiffs' motion to remand is DENIED and defendant Chevron Chemical Company's petition to certify this order for immediate interlocutory appeal pursuant to 28 U.S.C § 1292(b) is GRANTED.

BACKGROUND

Plaintiffs Elaine F. Grant, Alfred Grant and Jacqueline Leary filed the original petition (the "Class Action Petition") in the 23 rd Judicial District Court, Parish of St. James, State of Louisiana against Chevron Phillips Chemical Co., LP ("Chevron Phillips") on February 13, 2001. Chevron Phillips removed the case to this Court on March 21, 2001. Plaintiffs filed the present motion to remand arguing that this Court lacks subject matter jurisdiction in this case. The basis for this Court's jurisdiction is diversity jurisdiction pursuant to 28 U.S.C. § 1332. Both parties agree that there is complete diversity between the adverse parties. The issue is whether the requisite jurisdictional amount is present. Plaintiffs did not specify any amount in damages. Chevron Phillips asserts that attorney's fees allowed pursuant to article 595 of the Louisiana Code of Civil Procedure ("Article 595") should be aggregated and attributed to the class representative. If this were done, the amount in controversy would exceed the $75,000 jurisdictional amount. The Court now considers whether attorney's fees pursuant solely to Article 595 can be aggregated onto the amount in controversy to satisfy the jurisdictional amount.

ANALYSIS

"When the plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds [the jurisdictional amount]." *Allen v. R & H Oil &*

Gas Co., 63 F.3d 1326, 1335 (5th Cir.1995) citing *De Aguilar v. Boeing Co.*, 11 F.3d 55,58 (5th Cir.1993). Although Plaintiffs did not specify any amount, Chevron Phillips argues that if the attorney's fees pursuant to Article 595 are added to the claim of the class representative the amount in controversy will certainly exceed the jurisdictional amount.

The relevant language of Article 595 states that "[t]he court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class." The Fifth Circuit in *In re Abbot Laboratories* considered the role of this codal article in determining the jurisdictional amount. *See* 51 F.3d 524 (5th Cir.1995)

In *Abbot*, plaintiffs filed a class action suit based on the antitrust laws of Louisiana. *See id.* at 525. The district court found diversity jurisdiction over the named plaintiffs' claims but not over claims of the other members of the class. *See id.* Nevertheless, based on the doctrine of abstention, the district court remanded the case. *See id.* The Fifth Circuit affirmed the district court's ruling that the amount in controversy met the jurisdictional amount and that it had diversity jurisdiction over the claims, but reversed its decision to abstain from exercising diversity jurisdiction. *See id.* The Fifth Circuit held that the distribution of attorney's fees

centers on two statutes. *See id.*, at 526. The first, Article 595, gives a court the power to allow the representative parties reasonable attorney's fees when a fund is made available. *See id.* The second "key" Louisiana statute is Section 51:137 of the Louisiana Revised Statutes, which concerned actions involving monopolies and price fixing. *See id.* Section 51:137 lists attorney's fees as an element of the damages that a plaintiff can recover under that statute. *See id.* The Fifth Circuit rejected plaintiffs' argument that under Article 595 the fees should be distributed pro rata to all members of the class. *See id.* Instead, the court added the attorney's fees to the named plaintiffs' amount in controversy making that claim sufficient to meet the jurisdictional amount. *See id.* If one plaintiff's award does reach the necessary amount, the court may exercise supplemental jurisdiction over the remaining plaintiffs regardless of their amount of damages. *See id.* at 529.

*2 Two lines of reasoning have sprung from *Abbot* creating a split among the district courts in this Circuit. *See Braxton v. IMC Phosphates MP, Inc.*, 2000 WL 1576827 (E.D.La.2000) (Clement, J.). Some district courts have interpreted *Abbot* to mean that attorney's fees allowed pursuant to Article 595 may be added to plaintiffs' amount in controversy only if, in addition to Article 595, there is another statute that allows recovery of attorney's fees as an element of the damages. *See Cooper v. Koch Pipeline, Inc.*, 1995 WL 931091 (E.D.La.1995) (Fallon, J.); *Ace Pest Control Co. v.*

Kmart Corp., 979 F.Supp. 443 (E.D.La.1997) (Porteous, J.); *Greer v. Mobile Oil Corp.*, 1997 WL 180477 (E.D.La.1997) (Clement, J.); *Vaughn v. Mitsubishi Acceptance Corp.*, 1999 WL 1277541 (E.D.La.1999) (Sear, J.); *Dixon v. Ford Motor Credit Co.*, 1998 WL 914260 (E.D.La.1998) (Barbier, J.) (acknowledging that there is a split in the courts). Others have interpreted *Abbot* to mean that attorney's fees may be added to the amount in controversy even if the sole basis for attorney's fees is Article 595. *See Millet v. Marathon Oil, Co.*, 1995 WL 396313 (E.D.La.1995) (Clement, J.) ("*Millet I*"); *Kimball v. Modern Woodmen of America*, 939 F.Supp. 479 (M.D.La.1996) (Parker, J.); *In re Gas Water Heater Products Liability Litigation*, 1996 WL 732525 (E.D.La.1996) (Duval, J.); *Duncan v. Equitable Life Assurance Society*, 1996 WL 736988 (E.D.La.1996) (Duval, J.). Plaintiffs rely on the former, and Chevron Phillips on the latter.

Attorney's Fees Based Solely on Article 595

In *Millet I*, the first case to address this issue following the *Abbot* opinion, the court denied plaintiff's motion to remand because the attorney's fees allowed by Article 595 would have caused the amount in controversy to exceed the jurisdictional amount. *See* 1995 WL 396313. In a motion to reconsider, the plaintiff in *Millet I* urged the court to limit *Abbot* to cases involving the "key" price fixing statute. *See Millet v. Marathon Oil, Co.*, 1995 WL 495901 (E.D.La.1995) (Schwartz, J.) ("*Millet II*"). However, the court in

Millet II denied plaintiff's motion noting that the court in *Abbot* "focused the remainder of its discussion solely on ... Article 595." *Id.*

Similarly, in *McNight v. Illinois Central Railroad*, 967 F.Supp. 182 (E.D.La.1997) (Duval, J.), the court held that "based on the plain language found in [*Abbot,*] ... the amount in controversy requirement would be met." *McNight*, 967 F.Supp. at 184 (reaffirming the court's holding in *Francis v. Lomas Mortgage USA, Inc.*, 1995 WL 468172 (E.D.La.1995)). Likewise, *Brooks v. Georgia Gulf Corp.*, 924 F.Supp. 182 (M.D.La.1996) (Polozola, J.), found that attorney's fees pursuant to Article 595 when aggregated onto the damages would cause the amount in controversy to exceed the jurisdictional amount.

Attorney's Fees Based on Article 595 Plus Another Statute

*3 However, other courts in the Eastern District of Louisiana have interpreted *Abbot* to stand for the proposition that attorney's fees pursuant to Article 595 may be added to the amount in controversy only when, in addition to Article 595, there is another statute that allows recovery of attorney's fees as an element of the damages.

This Court first addressed this issue in *Cooper v. Koch Pipeline. See* 1995 WL 931091. In that case, this Court held that in class action suits attorney's fees pursuant Article 595 may be factored in the amount in controversy only when

another statute allows recovery of attorney's fees as an element of the damages. *See Cooper*, 1995 WL 931091 at *2. The Court reasoned that *Abbot* considered La. R.S. 51:137 "key" in its decision to include attorney's fees when determining the amount in controversy because 51:137 [FN1] allows a successful plaintiff to recover a "reasonable attorney's fee" as part of her damages. *See id.* The Court noted that 51:137 carried an award of attorney's fees over and above an award for compensatory damages. *See id.* Article 595 carries no such extra award. *See id.* Rather, Article 595 allows the court to designate a certain amount of the recovery to be awarded as attorney's fees and does not compel the defendants to pay anything over and above the amount of compensatory damages. *See id* .

FN1. La. R.S. 51:137 provides:
Any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover threefold damages sustained by him, cost of suit, and a reasonable attorney's fee.

Likewise, the court in *Johnson v. Cytec Industries, Inc.*, 1999 WL 212753 (E.D.La.1999) (Vance, J.), stated that "[t]he Fifth Circuit based its decision on two Louisiana statutes"-Article 595 and La. R.S. 51:137. *Johnson*, 1999 WL 212753 at *3. Other district courts have held *Abbot* inapplicable to class action suits brought pursuant to

Article 595 when another statute does not mandate the award of attorney's fees over and above an award of compensatory damages. *See id.* (citing *Ace Pest Control Co. v. Kmart Corp.*, 979 F.Supp. 443; *Greer v. Mobile Oil Corp.*, 1997 WL 180477).

Chevron Phillips notes that as a result of the split of authority that exists in Louisiana federal district courts the decision as to whether a diversity action can be successfully filed in or removed to federal court depends on the luck of the draw. A review of the jurisprudence supports their argument. There needs to be uniformity on this issue. Therefore, this question is appropriate for interlocutory appeal under 28 U.S.C. § 1292(b).

CONCLUSION

To allow the Fifth Circuit to address the split among the district judges on this issue, Plaintiffs' motion to remand is DENIED, reserving Plaintiffs' right to reurge the motion and Chevron Phillips' motion to certify this order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is GRANTED.

FILED
FEB 27 2003

No. 02-1140

IN THE

Supreme Court of the United States

ELAINE F. GRANT, ALFRED GRANT,
and JACQUELINE LEARY,

Petitioners,

v.

CHEVRON PHILLIPS CHEMICAL CO., L.P.
as successor in interest to Chevron Chemical Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF QUESTION PRESENTED

Do the attorney fees expressly awardable to a class representative under a specific and unique provision of Louisiana's class action law (namely, Article 595 of the Louisiana Code of Civil Procedure), if reasonably anticipated to exceed $75,000 for the claims alleged in the class action lawsuit, satisfy the amount-in-controversy requirement for federal diversity jurisdiction in the absence of any other statutory predicate under Louisiana law for an award of attorney fees?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent respectfully submits this Corporate Disclosure Statement.

The parent corporation of respondent Chevron Phillips Chemical Company LP is Chevron Phillips Chemical Company LLC. ChevronTexaco Corporation and ConocoPhillips each own 10% or more of Chevron Phillips Chemical Company LLC.

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STATEMENT OF THE CASE

As petitioners[1] observe, "[t]he facts of this case are uncomplicated and undisputed."[2] Petition for Writ of Certiorari ("Writ") at 1. However, petitioners fail to observe that the issue presented in this case is unique to Louisiana, arising as it does from the language of Article 595 of the Louisiana Code of Civil Procedure, which authorizes a court to award attorney fees directly to the class representatives in class actions brought in Louisiana.[3]

Respondent, Chevron Phillips Chemical Company LP ("CPChem"), removed the case to federal court on the basis of diversity jurisdiction, urging, *inter alia*, that: (1) in determining jurisdictional amount in class actions brought under Louisiana's class action regime, including particularly

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1. Petitioners are sometimes referred to herein as "plaintiffs."

2. Consistent with the allegations in their Class Action Petition, petitioners describe the incident of February 12, 2001 as having involved an "explosion." Writ at 1. While a fire did occur at the chemical facility, respondent maintains that no explosion preceded, accompanied, or followed the fire.

3. Article 595 authorizes the award of attorney fees that are expressly attributed solely to the plaintiffs as the named class representatives. Article 595(A) states:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

LA. CODE CIV. P. art. 595(A).

Article 595 of the Louisiana Code of Civil Procedure, attorney fees for the entire litigation are aggregated and attributed to the class representative; and (2) any award of attorney fees on the basis of the total damages to the class alleged in the Class Action Petition would exceed the $75,000 jurisdictional amount, notwithstanding plaintiffs' failure to plead a specific amount of damages. *See* Notice of Removal, ¶¶ 6(b)(2), (5) (R. at 113, 117, 119). Plaintiffs moved to remand the case to state court, arguing that the amount in controversy was less than $75,000 and that Article 595 alone could not provide the basis for an award of attorney fees to the class representatives but must be accompanied by a substantive Louisiana fee-shifting statute. *See* Motion to Remand (R. at 64-71).

The district court denied the plaintiffs' motion to remand and certified the issue for immediate appeal to the Fifth Circuit. The Fifth Circuit affirmed the denial of the plaintiffs' motion to remand, holding:

> on the authority of art. 595(A), that when, in connection with a Louisiana class action suit that asserts a cause or causes of action for which there is no separate attorney's fees provision under Louisiana law, attorney's fees are nevertheless (1) allowable to the class representatives, and (2) attributable to the class representatives for purposes of the court's calculation of the amount in controversy. Here, art. 595(A) serves dual purposes in the context of determining jurisdictional amount in connection with removal and remand of Louisiana class actions: (1) Art. 595(A) authorizes the allowance of attorney's fees to class representatives in default of fees being

> provided by some other separate statute; and (2) as construed in [*In re*] *Abbott* [*Laboratories*], art. 595(A) requires that allowable attorney's fees be attributed to the class representative(s) (to the exclusion of non-representative members of the class) in calculating the amount in controversy under § 1332. Stated differently, when a putative Louisiana plaintiffs' class advances a cause of action, such as tort or strict liability, for which Louisiana makes no separate provision for attorney's fees, the aggregate fee allowable under art. 595(A) shall be attributed entirely to the class representatives and included in calculating the amount in controversy.

Grant v. Chevron Phillips Chemical Co., 309 F.3d 864, 876-77 (5th Cir. 2002).

As the Fifth Circuit reasoned, Article 595 of the Louisiana Code of Civil Procedure calls for an award of attorney fees to be made to the class representatives. Contrary to petitioners' position below, under *In re Abbott Laboratories*, 51 F.3d 524, 526-27 (5th Cir. 1995), Article 595 does not require a separate fee-shifting statute to support attribution of attorney fees to the named plaintiffs – the putative class representatives – in a class action. Article 595 alone requires such attribution, because it contains an "express *authorization* for the court to allow attorney's fees to the class representatives." 309 F.3d at 876 (emphasis in original). When the value of these fees are anticipated to exceed $75,000, as here, the amount-in-controversy requirement is satisfied as to the named plaintiffs (*i.e.*, the putative class representatives). Accordingly, the Fifth Circuit determined that diversity jurisdiction exists in this action.

The Fifth Circuit considered and dismissed both of the petitioners' primary contentions on appeal – namely, that the amount "in controversy" should not include an award of attorney fees (1) that is not mandatory, but merely permissive; and (2) that is awardable from a common fund (*i.e.*, funds available for the class as a whole) and does not represent a single title or right of class members. Writ at 3-4. As to the first contention, the Fifth Circuit expressly "[d]eclin[ed] to create a circuit split with the Ninth Circuit, . . . hold[ing] that when there is state statutory authority for the court to award attorney's fees to class representatives, 'either with mandatory or discretionary language, such fees may be included in the amount in controversy.'" 309 F.3d at 874 (quoting *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998)). As to the second issue, the Fifth Circuit expressly determined that this case was not a common fund case. 309 F.3d at 872-73.

In short, in *Grant*, the Fifth Circuit answered "an important removal and remand question," but one "unique to Louisiana's class actions because of the state's statutory scheme." 309 F.3d at 866. As such, this case does not merit this Court's review.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Present A Conflict With Any Decision Of The Eleventh Circuit Or This Court

Petitioners rely upon a single case, the Eleventh Circuit's decision in *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792 (11th Cir. 1999), to urge the existence of a conflict with the Fifth Circuit's decision here. In *Davis*, the court held that attorney fees to be deducted from a common fund class recovery under equitable fee-shifting provisions of Alabama law may not be aggregated for purposes of satisfying diversity's amount-in-controversy requirement, because class members do not have a single title, right or undivided interest in such fees. But *Davis* is easily distinguishable from this case, as the Eleventh Circuit itself appears to have contemplated.

At the outset, neither the issue presented in this case, nor even the issue presented in *Abbott*, was before the Eleventh Circuit in *Davis*. The *Davis* court framed the issue it faced as follows: "The narrow question we answer now is thus only whether a fee to be deducted from a common fund may, if it exceeds $75,000, satisfy the amount-in-controversy requirement." 182 F.3d at 796. This is a far different issue than the question of *attribution* addressed in *Abbott*, *see Grant*, 309 F.3d at 870 ("[T]he sole relevant issue in *Abbott* was whether art. 595(A) changes the attribution to require that the total amount of attorney's fees assessable against the defendant under [La. R.S.] § 51:137 be attributed exclusively and entirely to the class representatives."), or the question of *authorization* raised in the case *sub judice*, 309 F.3d at 871 ("[W]hether standing alone, art. 595(A) can also serve as an independent source of attorney's fees in the

absence of a separate statutory source."). The differences in these issues highlight the controlling distinctions between this case and *Davis*.

First, the issue the *Davis* court addressed arose in the context of an award of attorney fees under *equitable* principles of the so-called "common fund" doctrine, rather than pursuant to *statute*. 182 F.3d at 795-96. The Eleventh Circuit acknowledged this distinction by citing and then discounting the relevance of *Abbott*'s holding, which it described parenthetically as follows: "award of attorneys' fees against defendant *under Louisiana statute* is attributed only to the class representatives, and therefore can satisfy the jurisdictional amount in controversy." *Id.* at 796 (emphasis added). In other words, the existence of a fee-shifting statute in Louisiana meant that the answer to the amount-in-controversy question would be resolved as a matter of statutory interpretation in class action cases there, and not by an examination of equitable principles as in *Davis*, applying Alabama law. In short, Alabama statutory law does not include a provision like Louisiana's Article 595, which both *authorizes* an award of attorney fees from a class recovery and *aggregates* the award to the class representatives.[4]

A second distinction, albeit very much bound up in the first, is that *Grant*, the case before the Court, is not a "common fund" case. The Fifth Circuit expressly noted this

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4. The Eleventh Circuit is clear on this distinction. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1080 n.11 (11th Cir.) (distinguishing *Abbott* as involving a state statute authorizing an award of attorney fees to the class representatives), *cert. denied*, 531 U.S. 957 (2000); *Darden v. Ford Consumer Finance Co.*, 200 F.3d 753, 758 n.4 (11th Cir. 2000) (same).

distinction in explaining the workings of Article 595 as a "fee-shifting statute":

> . . . [A]rt. 595(A) remains a fee-shifting statute, but the shifting is not between the class and the defendant. Instead, the shifting is between the class representatives and the rank and file members of the class. Furthermore, such shifting is *not* restricted to *common fund cases* (*which this case is not*): The court can allow fees to the class representatives either from "a fund made available" or from "a recovery or compromise . . . which is beneficial" to the class. Thus, in *a non-fund case like this one*, each class member's damage recovery could be reduced by the court and shifted to the class representatives, even if art. 595(A) were construed narrowly to prohibit the court from assessing attorney's fees to the losing tortfeasor.

Grant, 309 F.3d at 872-73 (emphasis added).

Finally, the *Davis* court could not find that a common-fund attorney fee represented a "single title or right" of the plaintiffs – and hence aggregable for purposes of "matter in controversy" – because "[w]hen, as here, the damages claimed are purely compensatory, the attorneys' fees are no more aggregable than the compensatory damages would be." 182 F.2d at 796. In other words, because, as in *Zahn v. International Paper Co.*, 414 U.S. 291, 294, 94 S. Ct. 505, 508 (1973), compensatory damages in a class action are not aggregable to satisfy diversity's jurisdictional amount-in-controversy, but instead are to be calculated on a pro rata basis across the entire class, attorney fees deducted from the

compensatory damage award, as part of the class recovery, are to be viewed no differently. That is to say, if the damages in a class action cannot be attributed to any single class member because class members do not share a single title, right or individual interest in such damages, then neither can an attorney fee award deducted from the class damages be aggregated as the "matter in controversy." However, these principles have no bearing in Louisiana, where a statutory provision, Article 595 of the Code of Civil Procedure, expressly provides for the aggregation and attribution to the class representatives of attorney fees awarded as part of the class action recovery.[5] *See Abbott*, 51 F.3d at 526-27

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5. Courts in states other than Louisiana, which do not have Article 595's attribution language, hold that damages awardable to a class must be assessed pro rata to each class member to ascertain whether the jurisdictional threshold is satisfied. The existence of a fee-shifting statute in these cases does not alter the analysis. The fee award to the class is to be examined pro rata, and added to the pro rata value of the claimed compensatory damages, in weighing the amount in controversy. *See, e.g., H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000) ("The fee award could also be attributed to the plaintiff class as a whole and therefore allocated pro rata among its members for purposes of determining the amount in controversy"; construing Connecticut fee-shifting statute), *cert. denied*, 534 U.S. 894 (2001); *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir.) (claim for attorney fees under California fee-shifting statute did not satisfy amount in controversy, because aggregation of such fees to named plaintiff would conflict with the policy of *Zahn* that each class member must satisfy the amount-in-controversy requirement), *cert. denied*, 459 U.S. 945 (1982). Hence, it is plain that the existence of a state fee-shifting statute, apart from a statute like Article 595 that attributes a discrete portion of an award (here, attorney fees) to the class representatives, is not determinative of the amount-in-controversy question. Instead, as the Fifth Circuit held below in *Grant*, it is Article 595's language

(Cont'd)

("The plain text of the first sentence of 595 awards the fees to the 'representative parties.' . . . Their rights of recovery were not created by a judge's summing the discrete rights of class members. The district court applied the law of Louisiana."). Thus, in Louisiana, by operation of Article 595, class representatives do have a statutorily created "single title or right" and "undivided interest" in the class action attorney fee award.

In sum, petitioners are correct to say that an attorney fee award under Article 595 "does not represent a collective interest of the plaintiff class," Writ at 6, because an attorney fee award under Article 595 is the statutorily vested interest of the class representatives; however, petitioners are wrong to say that an attorney fee award under Article 595 "is not aggregable," Writ at 6, because under the express terms of the statute, it is. Petitioners can only establish the relevance of *Davis* by ignoring this error.

Accordingly, the Fifth Circuit's decision in *Grant* does not conflict with the Eleventh Circuit's decision in *Davis* or any decision of this Court referenced by petitioners as cited in *Davis*.

(Cont'd)

of aggregation and attribution that is determinative. *Cf. Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1293 & n.7 (10th Cir. 2001) (under New Mexico law, rejecting aggregation of attorney fees to satisfy amount in controversy, but observing with particular reference to Louisiana's Article 595: "The result might be different if the state statute under which fees are sought expressly awards those fees solely to the class representatives.").

II. The Decision Below Does Not Present A Conflict With Louisiana's Interpretation Of Article 595

Petitioners cite to a *single* decision by a *single* Louisiana appellate court, not the Louisiana Supreme Court, to urge a conflict between the Fifth Circuit's decision in *Grant* and Louisiana's interpretation of Article 595.[6] Even if such a conflict existed (and it does not), it would not constitute one of the "compelling reasons" required for review by this Court on a writ of certiorari. *See* S. Ct. R. 10. This Court's Rule 10(a) identifies as certworthy a decision by a United States court of appeals on an important federal question "that conflicts with a decision by a state court of last resort," not an intermediate state appellate court.

Moreover, no conflict can exist, as petitioners themselves recognize, because the Louisiana appellate decision cited did "not interpret [Article] 595(A) for the purposes of determining amount in controversy," Writ at 6 – which was the only "important federal question" addressed by the Fifth Circuit in the decision below.

Further, as to the supposed conflict identified by petitioners, whether the discretionary nature of an attorney fee award under Article 595 has legal importance for ascertaining the existence of the requisite amount in

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6. Notably, even the intermediate appellate court decision cited by petitioners was ultimately reversed by the Louisiana Supreme Court, albeit on an issue peculiar to Louisiana's procedural law. *See In re Gas Water Heater Products Liability Litigation*, 697 So. 2d 341 (La. App. 1997), *rev'd*, 711 So.2d 264 (La. 1998) (in determining jurisdiction of parish court under specific wording of procedural code article, amount demanded in class action is measured by total sum demanded on behalf of entire class).

controversy to support federal diversity jurisdiction is a question of federal law, not state law. And, as expressly considered in the decision below, federal courts have addressed and resolved the question in a manner the Fifth Circuit saw fit not to disturb as to create a circuit split.[7] *Grant*, 309 F.3d at 874.

In short, that Article 595 empowers a court to allocate attorney fees to the class representatives, but does not mandate that any such fees be awarded is not determinative. Article 595 makes the award of attorney fees in a Louisiana class action discretionary with the court, but there is no dispute, on the face of the allegations in the Class Action Petition in this case, that plaintiffs have requested that the discretion authorized by Article 595 should be exercised in their favor. Hence, the requested attorney fees were properly considered by the courts below to be a part of the amount in controversy.

The question whether an attorney fee award under Article 595 is a separate "element of damages" is also a red herring. As with any other amount-in-controversy case, the issue is whether the amount placed in controversy, and potentially

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7. Federal courts have resolved the issue posed by the mandatory/discretionary distinction by holding that attorney fees authorized by statute, whether with the use of mandatory or discretionary language, may be included in the amount in controversy. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998); *Surber v. Reliance National Indemnity Co.*, 110 F. Supp. 2d 1227, 1232 (N.D. Cal. 2000). *See* 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3712, at 277-78 (1998) ("[W]hen the applicable substantive law makes the award of an attorney's fee discretionary, a claim that this discretion should be exercised in favor of plaintiff makes the requested fee part of the amount in controversy.").

recoverable by any plaintiff, exceeds the jurisdictional threshold. No one questions the fact that all of the damages claimed by plaintiffs to be owed by CPChem in this case are part of the amount placed in controversy. All the damages are a part of the amount in controversy – and these damages include that part of the damages demanded by the class representatives to be recoverable as attorney fees.

The only question then is whether the amount due any single member of the putative class of plaintiffs is potentially an amount in excess of the $75,000 jurisdictional threshold. Because of this Court's holding in *Zahn*, a pro rata spread of damages over the entire class often answers this question in the negative. But, because of the *unique* wording of Louisiana's class action statute, *Abbott* answered this question differently for class actions in Louisiana when it read Article 595 as attributing the class action award of attorney fees to the class representatives. The *Abbott* court found compelling "the *distinct policy choices* behind Louisiana's decision regarding rights of recovery by class members." 51 F.3d at 526 (emphasis added). Said the court: "That a state chooses a set of rules that result in an award in excess of [the jurisdictional threshold] frustrates no policy of *Zahn*. Simply put, under the law of Louisiana the class representatives were entitled to fees." *Abbott*, 51 F.3d at 526-27. Thus, without regard to whether the $75,000 threshold is exceeded by an attorney fee award from the class recovery alone or whether it is exceeded by an attorney fee award as a separate element of damages, the amount-in-controversy requirement is satisfied by the express terms of Article 595.

After all, attorney fees recoverable as an "element of damages" in class actions in states other than Louisiana, while augmenting the amount of recovery for the plaintiffs, do not

alter *Zahn* in any way and, hence, will not satisfy the amount-in-controversy requirement by the sheer force of their availability. In contrast, in Louisiana class actions, as a result of *Abbott*'s and *Grant*'s interpretation of Article 595, attorney fees recoverable under Article 595 – whether a portion of the class recovery not augmented by a statutory fee award or one augmented by such an award – are aggregated and attributed to the class representative. Hence, it is the operation of Article 595, not the character of attorney fees as a separate element of damages, that satisfies diversity's amount-in-controversy requirement.

Accordingly, the Fifth Circuit's decision in *Grant* does not conflict with "Louisiana's interpretation" of Article 595.

III. This Case Does Not Have Far-Reaching Implications, But Its Impact Is Confined To Louisiana As A Result Of A Unique Statutory Provision Of Louisiana's Class Action Law

Petitioners assert that the decision below means that "all class actions against diverse defendants will cease to exist in Louisiana state courts," because "there can be little doubt that attorney's fees in practically all class actions would be sufficient to reach the jurisprudential [a]mount of $75,000."[8] Writ at 8. Three points demonstrate that the implications of the decision below are not certworthy.

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8. Interestingly, this latter point of the petitioners was made as an "apology" by both the majority and concurring opinions in *Davis*, the principal decision upon which petitioners rely. 182 F.3d at 797-98 (majority), 798-99 (Nangle, J., concurring: noting that class action attorney fees will nearly always far exceed $75,000).

First, the impact of the decision is confined to cases in Louisiana involving complete diversity of citizenship between the parties. The *Grant* decision does nothing to undermine the complete diversity requirement of *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806). Hence, all Louisiana class actions involving non-diverse defendants – which respondent hazards to guess are the great bulk of Louisiana class actions – will remain in state court even in the wake of the decision below.

Second, even if petitioners' contention is true, the impact of the decision is confined to Louisiana and the class actions brought in only its state courts. This hardly presents the kind of far-reaching, multi-state implications this Court usually requires for certiorari review.

Finally, even if petitioners' contention is true, it would be the result of the unique legislative and policy choices of a state legislature. *See Abbott*, 51 F.3d at 526 (alluding to "the distinct policy choices behind Louisiana's decision regarding rights of recovery by class members"). In our system of cooperative federalism, a state should have the freedom to experiment with such choices, no matter the impact on the docket of federal courts in the state.[9] In the oft-quoted words of Justice Brandeis:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious

9. Respondent doubts seriously that Louisiana's "federal courts will be awash in class action litigation for . . . *de minimis* claims," as petitioners suggest. Writ at 8. The defendants' exposure to attorney fees alone in such cases eliminates the *de minimis* characterization of the amounts in controversy. Moreover, respondent apparently has more faith in (if not exp[illegible]e with) the creativity of class action plaintiffs in crafting their claims – usually by joining non-diverse defendants – to avoid federal court.

> consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 386 (1932) (Brandeis, J., dissenting).

Accordingly, the Fifth Circuit's decision in *Grant* does not pose the far-reaching implications or importance as would warrant this Court's review.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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